Construction Products, Inc. and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 172, AFL–CIO. Cases 9–CA–40056 and 9–CA–40294

March 13, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 29, 2003, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging employees Richard Carper and Anthony Richards because of their union activities. We agree with the judge that the General Counsel satisfied his initial burden of proving that union activity was a motivating factor in the Respondent's decision to discharge them. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981). In so finding, we reject the Respondent's argument that the General Counsel failed to establish that the Respondent had knowledge of Carper's and Richards' union activity when it decided to discharge them.

The facts, as set forth more fully in the judge's decision, are as follows. The Respondent is engaged in steel erection and ironwork in the construction industry. The Respondent hired Richard Carper and Anthony Richards on February 26, 2003.[3] They began work the following day.

On March 5, it was raining when Carper and Richards reported to work. All of the Respondent's employees waited in their vehicles for the rain to break. After 90 minutes of waiting, Carper and Richards spoke with their supervisor, Field Superintendent Gary O'Neill. After expressing concern that the rain had rendered the jobsite unsafe, Carper and Richards informed O'Neill that they were leaving for the day. O'Neill responded, "okay." Richards and Carper then told O'Neill that the weather forecast called for freezing rain the next day and that, if freezing rain occurred, they would not report to work because of their 100-mile commute. O'Neill replied that he would see them the next day "if the weather was good." The two employees then left the jobsite. Later that day, Carper and Richards signed authorization cards at the union hall, and the Union mailed a letter to the Respondent stating that Carper and Richards were members of its organizing committee.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding that it is an employer within the Board's jurisdiction. We adopt the judge's finding. The Respondent's answer denies par. 2(c) of the complaint, which alleges that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Respondent's answer admits the underlying facts that support such employer status. Specifically, the Respondent admits in its answer that during the 12 months preceding the complaint, it purchased and received at its Columbus, Ohio facility goods in excess of $50,000 from out of State. These admitted facts clearly establish that the Respondent is engaged in commerce within the meaning of the Act and that the Respondent is within the Board's self-imposed discretionary jurisdictional standards. *George Washington University*, 346 NLRB 155, 156 fn. 7 (2005) (citing *Spruce Co.*, 321 NLRB 919, 919 fn. 2 (1996)).

No party excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire Kurt Thompson.

Chairman Battista and Member Schaumber agree that, under extant law, the General Counsel satisfied his burden of establishing that Coe, Clapper, Hoffman, Jackson, Miller, and Seymour had experience or training relevant to the announced or generally known requirements of the position for hire. See *Kaminski Electric & Service Co.*, 332 NLRB 452 (2000) (finding that an alleged discriminatee had adequate experience based solely on the contents of his application, which was an exhibit in evidence). Chairman Battista and Member Schaumber note that the General Counsel did not elicit any testimony from the discriminatees, other than Coe, on the subjects of experience and training. The Respondent does not seek to overrule *Kaminski Electric*. Accordingly, without passing on whether *Kaminski Electric* was correctly decided, Chairman Battista and Member Schaumber follow it for institutional reasons.

Member Liebman notes that the General Counsel did not except to the judge's finding that the Respondent's advertising itself as a "nonunion" company in its want ad was not indicative, by itself, of antiunion animus.

[2] We shall modify the Order to conform to the findings and substitute a new notice to conform to the Order as modified.

Consistent with *Dean General Contractors*, 285 NLRB 573 (1987), the judge ordered reinstatement and backpay for the eight discriminatees. Chairman Battista and Member Schaumber recognize that *Dean General* represents current Board law. They have concerns, however, as to whether that case was correctly decided. Accordingly, they will leave to compliance the issue of how long these employees, if they had not been discriminated against, would have remained employees of the Respondent, and the related issue of which party bears the burden of proof on this matter. The resolution of these issues will determine the amount of backpay and whether reinstatement continues to be appropriate. See *Quantum Electric, Inc.*, 341 NLRB 1270 (2004).

[3] All dates are in 2003, unless otherwise indicated.

The weather was harsh on March 6. Carper and Richards did not report to work, consistent with their earlier notice to O'Neill. Employees who did report to the jobsite did not work because of the weather conditions. That same day, the Respondent received the Union's letter.

When Carper and Richards reported to work on March 7, the Respondent discharged them. At the time it discharged them, the Respondent issued two written disciplinary reports to Carper, one for leaving work on March 5 and the other for not reporting to work on March 6. The Respondent issued three written disciplinary reports to Richards. The first two reports were identical to those issued to Carper. The third disciplinary report was for refusing to change jobsites on March 5.[4]

Citing its witnesses' testimony, the Respondent claims that it *decided* to discharge Carper and Richards *before* it first learned of their union activity on March 6, when Office Manager Susan Jacobs opened the Union's letter. Based on this purported chronology, the Respondent argues that union activity was not, and could not possibly have been, a motivating factor in its decision to discharge Carper and Richards. We find that the Respondent's argument lacks merit.

The judge implicitly discredited the Respondent's witnesses' testimony regarding the relative timing of its decision to discharge the two employees. He found that "[t]he testimony of the Respondent's witnesses regarding the circumstances leading to the discharges of Carper and Richards was contradictory and not fully credible." He then relied specifically on the receipt of the Union's letter to establish that the Respondent had knowledge of Carper's and Richards's union activities in concluding that the discharges were motivated by union animus. In so finding, the judge necessarily discredited the Respondent's witnesses' testimony regarding the timing of these events. We adopt these credibility resolutions.

Moreover, we find that the judge reasonably inferred both that the Respondent knew of Carper's and Richards' union activity when it decided to discharge them and that union animus was a motivating factor in the discharges. The circumstances surrounding the discharges strongly support these two inferences. Even though Supervisor O'Neill signaled prior approval of the March 5 and 6 absences, the Respondent claims that this conduct was the basis for its discharge decisions. Such an about-face is particularly suspicious given that the Respondent admittedly knew of Carper's and Richards' union activities when it discharged them on March 7. Under these circumstances, the judge reasonably found that the Respondent knew of the employees' union activity when it decided to terminate them and that union animus motivated the discharges. Cf. *Tidewater Construction Corp*., 341 NLRB 456, 458 (2004) (inferring animus from pretext).[5]

We agree with the judge that the Respondent failed to carry its burden of proving that it would have discharged Carper and Richards even absent their union activities. We rely heavily on the fact that the Respondent claims to have discharged Carper and Richards for engaging in conduct that Supervisor O'Neill had tacitly approved in advance. The Respondent failed to explain why it did so, and thus it has failed to establish that it would have terminated Carper and Richards even absent their union activities.[6]

Finally, the Respondent excepts to the judge's recommended Order to the extent that it requires the Respondent to offer employment to a total of eight discriminatees. The Respondent argues such a remedy is inappropriate because the General Counsel failed to prove that the Respondent ever had eight vacancies to fill. We adopt the judge's recommended Order in relevant part. To obtain an instatement and backpay remedy for a refusal-to-hire violation, the General Counsel must prove that an opening existed for each discriminatee for whom he requests that relief. *FES*, 331 NLRB 9, 14 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d

[4] The Respondent's witnesses did not mention this alleged refusal to transfer jobsites when testifying to the Respondent's reasons for discharging Richards, nor did the Respondent cite this alleged incident in its briefs to the Board. The Respondent does not argue that it would have discharged Richards because of his alleged refusal to transfer jobsites on March 5 even absent his union activity.

[5] In adopting the judge's finding that animus was a motivating factor in the discharge decisions, we need not and do not rely on the fact that the Respondent had not discharged any other employee in the 2 years preceding the discharges of Carper and Richards. Absent evidence that the Respondent declined to discharge similarly situated employees, this fact does not establish an unlawful motive. Nor do we rely on the judge's suggestion that the Respondent's business was not adversely affected when Carper and Richards left work on March 5 and refused to report on March 6. Finally, we do not agree with the judge that the Respondent shifted its justifications for terminating Carper and Richards when Supervisor O'Neill failed to testify at the hearing that Richards's alleged refusal to transfer jobsites on March 5 was a factor motivating the discharge.

[6] The Respondent argues that O'Neill did not approve Carper's and Richards' departure on March 5 or their failure to report on March 6. However, the judge clearly credited Carper's testimony that O'Neill in fact gave those assurances.

In light of our finding above that the Respondent violated Sec. 8(a)(3) and (1) by discharging employees Richard Carper and Anthony Richards because of their union activities, we find it unnecessary to pass on the judge's additional finding that the Respondent independently violated Sec. 8(a)(1) by discharging employees Carper and Richards because of their alleged *protected concerted activities*. A finding that the discharges independently violated Sec. 8(a)(1) would be essentially cumulative and would not materially affect the remedy. See *Detroit Newspapers*, 342 NLRB 223, 224 fn. 5 (2004).

83 (3d Cir. 2002). The General Counsel proved that the Respondent had at least seven openings. Because the number of openings proven exceeds the number of discriminatees whom the Respondent unlawfully refused to hire, Clapper, Coe, Hoffman, Jackson, Miller, and Seymour are entitled to be instated with backpay. Board law governing appropriate remedies in unlawful-discharge cases is different. The General Counsel does not bear a burden of proving that openings exist when seeking an Order requiring reinstatement and backpay for unlawfully discharged employees. Consequently, the judge's recommended Order correctly required the Respondent to reinstate Carper and Richards with backpay.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Construction Products, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraph.

2. Substitute the following for paragraph 2(d).

"(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Richard Carper and Anthony Richards Sr., and the unlawful refusals to hire Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr., and within 3 days thereafter, notify the employees or applicants in writing that this has been done and that the discharges or refusals to hire them will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire you because you previously worked for unionized employers and received union wages.

WE WILL NOT discharge or otherwise discriminate against you because of your activities on behalf of International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 172, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Richard Carper and Anthony Richards Sr. full reinstatement to their former positions, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL offer Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr. immediate instatement to the positions for which they applied, or if those positions no longer exist, WE WILL offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled had they not been discriminated against.

WE WILL make Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr. whole for any loss of earnings and other benefits resulting from our failure to hire them, less any net interim earnings, plus interest.

WE WILL make Richard Carper and Anthony Richards Sr. whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Richard Carper and Anthony Richards Sr. and the unlawful refusals to hire Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr., and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or refusals to hire will not be used against them in any way.

CONSTRUCTION PRODUCTS, INC.

Mark Mehas, Esq., for the General Counsel.
Dennis L. Pergram, Esq., of Delaware, Ohio, for the Respondent.
Gregg Coe, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued on August 25, 2003,[1] against Construction Products, Inc. (the Respondent). The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by refusing to hire seven applicants for employment in February, and by discharging employees Richard Carper and Anthony Richards Sr. in March.

Pursuant to the notice, I conducted a trial in Columbus, Ohio, on September 25, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel's witnesses were Gregg Coe, an organizer for the Charging Party (the Union), and a named alleged discriminatee; and Carper and Richards. The Respondent called Clifton Parker, its president; Gary O'Neill, its field superintendent; Susan Jacobs, its office manager; and employee Don Black.

The General Counsel and the Respondent filed posthearing briefs, which I have duly considered.

Issues

1. Did the Respondent fail to hire the following applicants between February 6 and 11, because they had been employed by unionized employers and worked for union wages: Coe, Fred Clapper, Todd Hoffman, James Jackson, Mary Miller, Larry Seymour Jr., and Kurt Thompson?

2. Did Carper and Richards on March 5, cease work concertedly and engage in a strike, because they perceived unsafe conditions at the Dominion Homes jobsite (the jobsite)?

3. Were the Respondent's discharges of Carper and Richards on March 7, for refusing to work on March 5 and for not showing up for work at the jobsite on March 6, pretextual and based on their union or other protected concerted activities, or justified because they engaged in unprotected activity?

FINDINGS OF FACT

It is uncontested that the Respondent is an employer, and the Union a labor organization, within the meaning of the Act. For many years, the Respondent has engaged as a nonunion steel erection and ironwork contractor in the construction industry, performing commercial and industrial construction from its facility in Columbus, Ohio. Its customers' projects are financed by private funds, not tax dollars, and the Respondent performs virtually no public works. President Parker determines what wage rate the Respondent can afford to pay and still be competitive in bidding on jobs. He has established $13 an hour as the starting rate for ironworkers. The Respondent maintains a staff of three office employees, including Jacobs (who is Parker's daughter), and O'Neill, as well as between 6 to 10 ironworkers.

In 2001 and 2002, there were nine applicants for ironworker positions, of whom eight were hired.[2]

I. FAILURE TO HIRE APPLICANTS

The Respondent placed an advertisement in the Columbus Dispatch on February 2, for experienced steel erectors and/or crane operators.[3] The ad specifically stated, "Non-union."

Union Organizer Coe saw the advertisement and on February 5 called and said he was interested in the position. A woman who did not give her name said the Respondent was looking for as many qualified people as they could find because "they had a lot of work."[4] On February 6, Coe, along with Clapper, Hoffman, and Miller went to the Respondent's office, where they filled out and submitted applications.[5] Seymour applied on February 10, and Jackson on February 11.[6]

As to Kurt Thompson, the Respondent's records contain no application for employment or any other evidence documenting such. Although the General Counsel subpoenaed Thompson, he failed to appear at the hearing. The only evidence that he applied for a job is the affidavit he gave to the National Labor Relations Board (the Board) on April 10, on which the Respondent was not able to cross-examine him. In these circumstances, I recommend dismissal of the complaint as it relates to Thompson.

None of the other six applicants named above were hired. The Respondent assumed that all of them were union members, based on what was stated in their applications concerning their prior employers. Parker testified that from their employment histories, he concluded they had made more on previous jobs than the $13 to start that he was paying. He further testified that the seven individuals whom the Respondent hired in February and March, including Carper and Richards, had salary histories in their applications that were "in line with what we could afford to pay."[7] These seven were hired on or about the dates they applied. The Respondent never contacted any of the six alleged discriminatees to inquire what wage they would be willing to work for.

II. THE EMPLOYMENT AND DISCHARGES OF CARPER AND RICHARDS

Carper and Richards are friends. Prior to February, they worked on several jobs together, and both had been referred out by the Union on a "permit" basis.[8]

In response to the Columbus Dispatch ad, Carper called the Respondent on or about February 6 or 7, and said that he and a friend were looking for work. He apparently gave Richards' phone number, as well as his own, because on February 26,

[1] All dates are in 2003, unless otherwise indicated.

[2] See R. Exhs. 2, 3.

[3] GC Exh. 2.

[4] Tr. 19.

[5] Jt. Exhs. 1–3, 5.

[6] Jt. Exhs. 6, 4.

[7] Tr. 209. See Jt. Exhs. 7–13, dated between February 27 and March 31.

[8] Carper became a full-fledged union member in April; Richards the week prior to the hearing.

Parker called Richards. Parker asked if Richards and Carper could begin work the following day at the Canal Winchester job at a wage rate of $13 an hour. Richards asked about prevailing wage jobs. Parker responded that the job was not prevailing wage but that there would be such jobs available.

On February 27, Carper and Richards reported to work at the above jobsite. Field Superintendent O'Neill gave them job applications and told them to fill them out and return them the following day.

Carper and Richards again worked at the Canal Winchester jobsite on February 28. On Monday, March 3, they worked there in the morning until O'Neill told them to report to another job, the New Albany School. At the end of the day, O'Neill told them to report to a third job, the Dominion Homes project (the jobsite) at Tuttle Crossing, Dublin, Ohio.

They worked at the jobsite on March 4 and reported there together on the morning of March 5.

A. March 5

After arriving together at the jobsite on March 5, Carper and Richards testified, it was still raining. They remained in their van for about 1-1/2 hours, before Richards went over to O'Neill and spoke with him. Both of them then went over to Carper. As far as what was said when the three of them were together, I find Carper the most reliable witness. He appeared candid and had a good memory and, in contrast to Richards and O'Neill, all aspects of his testimony were fully plausible. Accordingly, I credit his version where it might conflict with those of Richards or O'Neill.

Both Richards and Carper voiced concerns that because of the rain and mud, they could slip and injure themselves. I credit Carper's testimony that O'Neill told them that no one else seemed to have any problem working.

The subject of prevailing wage came up. Although both Richards and O'Neill testified that Carper was present at the time, Carper mentioned nothing about the subject in relating what O'Neill said that morning. I believe that he would have remembered had he heard something about it. Indeed, Carper testified that on their first day of employment, he and Richards asked O'Neill if there would be any public work jobs, and O'Neill replied, very seldom.

Richards' version is that on the morning of March 5, he asked O'Neill about "wages on the job."[9] O'Neill replied that they did not pay prevailing wages, the job did not pay it, and "if I wanted a public works job for me to go to the God damn Union hall and sign up down there."[10] O'Neill recounted that Richards stated they thought the job was a public works job, to which O'Neill responded that if they were interested in making big dollars, they should go to the union hall.

Both Richards and Carper testified that when they told O'Neill they were leaving because it was still raining, he said okay. O'Neill did not dispute this. Further, Richards and Carper testified that they told him that the weather forecast was for freezing rain the following day, and if so, they would not be in because they had to drive approximately 100 miles one way. O'Neill replied that he would see them the next day if the weather was good. McNeill testified that he could not recall anything being said about their coming in the next day. I credit Richards' and Carper's testimony on this point. O'Neill did not controvert it, and in light of severe weather conditions at the time and the great distance Carper and Richards had to travel to get to the jobsite, I find it plausible that they would have raised the subject.

I heard various accounts regarding conditions at the jobsite on March 5. Carper, Richards, and Coe (who was at the site on March 4 and 5) concluded that conditions were unsafe. More specifically, Carper and Richards testified that because of rain, the site was very muddy and that footers were exposed with rebar sticking out of the footers with no caps on them; further, the piers for columns had no dirt around them and were full of water. In other words, there was a danger of slipping and being impaled on the rebars or of otherwise suffering injury.

On the contrary, O'Neill and employee Black testified that conditions on the jobsite were not markedly unusual. They also testified that all five of the other ironworkers on the jobsite performed a full days' work there.[11] Black testified that it was "just a typical job . . . It was a little bit of mud. . . . You're going to walk in mud regardless on a jobsite."[12] Other than having to kneel down sometimes and getting mud on his clothes, he experienced no particular problems working that day.

OSHA was not called, and there was no testimony from any safety experts as to whether or not the jobsite was "unsafe" that morning or on March 6. Accordingly, I do not have sufficiently reliable evidence on which to make a finding of fact regarding whether or not conditions on the jobsite were safe or unsafe on either March 5 or 6.

After leaving the jobsite that morning, Carper and Richards went to the union hall, where they saw Coe and signed union authorization cards.[13]

That day, March 5, Coe mailed a letter dated March 4 to the Respondent, stating that some employees had indicated an interest in having the Union represent them for purposes of collective bargaining and that "Rich Carper and Nick Richards are on the Organizing Committee."[14] The Respondent received the letter at about 11 a.m. on the morning of March 6.

The testimony of the Respondent's witnesses regarding the circumstances leading to the discharges of Carper and Richards was contradictory and not fully credible. Thus, when asked on direct examination whether he did anything after Carper and

[9] Tr. 67.
[10] Id.

[11] See R. Exh. 7.
[12] Tr. 192.
[13] GC Exhs. 6, 7.
[14] GC Exhs. 3, 4. It strikes me as very convenient that Carper and Richards signed union authorization cards on the same day they had refused to work and that the letter notifying Respondent that Carper and Richards were union supporters was mailed on that same day. Be that as it may, even assuming that some of the Union's conduct may have been calculated to bolster potential unfair labor practice charges, this did not remove Carper's and Richards' activities from the protections of the Act. See *Aztec Electric Co*., 335 NLRB 260, 262 (2000); *M. J. Mechanical Services,* 324 NLRB 812, 813–814 (1997) (cases involving "salts").

Richards left on March 5, O'Neill answered, "Nothing."[15] In contrast, Jacobs testified that O'Neill called her on the morning of March 5, and reported that Carper and Richards would not work that day. Jacobs further testified that she thereafter informed Parker, who responded that if they did not show up tomorrow, they were fired. Jacobs also testified she wrote a memo dated March 5 to O'Neill, after she spoke with Parker.[16] The language in the memo is strangely stilted. Although O'Neill was the one who presumably related to her the circumstances surrounding Carper's and Richards' refusal to work, the memo states, "Their reason for not working was due to the mud at the job site, however there is gravel inside the building making for safe working conditions." This language appears to be directed not to O'Neill but to someone who might later review the matter.

B. March 6 and 7

Carper and Richards testified that they did not go work on March 6 because of poor driving conditions. O'Neill testified that all the other employees showed up at the jobsite but did not work that day because of jobsite conditions.[17] Consistent with company policy, the other employees were paid for 2 hours as showup time. Carper and Richards were not.

Richards testified that he had no way to contact O'Neill; that he had asked O'Neill for an emergency jobsite number but that O'Neill had replied that there was none and that he did not give out his cellular number. According to Richards, O'Neill did not give him a business card containing his (O'Neill's) cell phone number until the time he was discharged on March 7. O'Neill, on the other hand, testified that he gave his business card containing his cell number to either Carper or Richards on the first day that they worked. I find it much more plausible that O'Neill would have given the business card to Richards on the first day of employment, rather than when Richards was terminated, and therefore credit this aspect of O'Neill's testimony.

That morning, March 6, O'Neill called Jacobs. He testified that he told her that Carper and Richards had failed to show up and for her to make out their checks for that week and the preceding week. However, O'Neill conceded that "I can't be sure of what I did tell her,"[18] weakening my confidence in his testimony. Jacobs testified that O'Neill told her to prepare their checks for both weeks because they were being let go, but she further testified that after talking to O'Neill, she called Parker and related the information, and he responded that Carper and Richards "didn't have a job."[19] Parker did not testify about his communication with Jacobs concerning them. Accordingly, who made the ultimate decision to discharge them is not ascertainable from the record.

Carper and Richards returned to the jobsite on March 7. O'Neill gave them their checks for the 2 weeks.[20] He also gave Richards "three warning notices," all dated March 7.[21] One was for "insubordination"—"Employee refused to change job sites for the following reasons: his wife would not know where he is." The second was for "Attendance"—"Employee did not show up to work or call in on 3/6/03." The third was for "insubordination"—"Employee refused to work due to muddy conditions. All other employees found jobsite conditions acceptable." Richards refused to sign them. Carper was given two warning notices,[22] identical to the second and third warning notices just described. He signed them in the belief that it was necessary to get his paychecks.

Richards asked if he and Carper were fired, O'Neill indicated yes, and Richards and Carper left the jobsite.

Although O'Neill gave Richards a warning for refusing to change jobsites, O'Neill testified that the reasons Richards and Carper were discharged were their refusal to work on March 5, and their failure to show up for work on March 6. He said nothing in his testimony regarding any refusal of Richards to change jobsites. Nevertheless, by letter dated March 6, Parker notified Richards that he was terminated not only for refusing to work and failing to show up but also because he "refused to change jobsites for personal reasons" on March 5.[23]

Richards subsequently filed for, and received, unemployment insurance benefits.[24]

The Respondent has never advanced as a reason for their discharges the actual job performance of Carper and Richards. Indeed, O'Neill testified that other than what occurred on March 5 and 6, he would have kept them as employees.

It was stipulated that other than Carper and Richards, the Respondent has discharged no employees during the 2-year period ending March 7.

LEGAL ANALYSIS AND CONCLUSIONS

I. THE DISCHARGES OF CARPER AND RICHARDS

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by discharging Carper and Richards because of their union activity and, further, also violated Section 8(a)(1), by terminating them because they engaged in protected concerted activity and in a strike on March 5.

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization."

Employees also have the right under Section 7 of the Act to engage in concerted activities for their mutual aid and protection. Concomitantly, an employer may not, without violating Section 8(a)(1) of the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such ac-

[15] Tr. 159.
[16] R. Exh. 6.
[17] See R. Exh. 7.
[18] Tr. 164.
[19] Tr. 178.
[20] Jt. Exhs. 16, 17.
[21] GC Exhs. 8, 9, 10.
[22] Jt. Exhs. 14, 15.
[23] GC Exh. 11.
[24] See GC Exh. 12; R. Exh. 1. Certain statements contained in the examiner's report are adverse to either Richards or Parker. I give those statements minimal weight, since there is no way to determine how accurately they reflected what Richards or Parker actually said, as opposed to the examiner's interpretations, opinions, and conclusions. Even though the unemployment compensation office stated that Richards quit, the record in this case clearly establishes that he was in fact discharged.

tivities. *Senior Citizens Coordinating Council,* 330 NLRB 1100 (2000).

The framework for analysis in cases alleging discrimination against employees on account of union or other protected concerted activity is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employees' protected conduct motivated the employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of such animus. Additionally, when protected concerted activity is alleged, the General Counsel must show, in addition to the above elements, that the employee's conduct was concerted (i.e., engaged in, with, or on the authority of other employees and not solely on his or her own behalf) and that the activity was protected by the Act. *Triangle Electric Co.*, 335 NLRB 1037 (2001), citing *Meyer Industries (Meyers I)*, 268 NLRB 493, 497 (1984),[25] see also *KNTV, Inc.*, 319 NLRB 447, 459 (1995).

Direct evidence of an antiunion motive in discharge cases is rare and, for that reason, reliance on circumstantial evidence, and reasonable inferences deriving therefrom, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75–76 (8th Cir. 1969). Thus, "Illegal motive has been held supported by a combination of factors, such as 'coincidence in union activity and discharge' . . . 'general bias or hostility toward the union' . . . 'variance from the employer's normal employment routine' . . . and 'an implausible explanation used by the employer for its action' . . ." *McGraw-Edison Co.,* above at 75.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in the absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1369 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, above at 1369, citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reasons for its action is the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

A. Union Activity

Carper and Richards signed union authorization cards on March 5, and the Respondent admittedly received on March 6, Coe's letter stating that they were on the Union's organizing committee. The elements of union activity and employer knowledge thereof are thus clear.

As to the element of antiunion animus, there is little direct evidence. The fact that the Respondent openly advertised itself as a nonunion company does not in and of itself equate to such animus. Moreover, even fully crediting Richards that O'Neill told him to "[g]o the God damn union," after Richards raised the subject of prevailing wages, this statement was devoid of any threat or coercion and must be taken in context. However, even assuming that these facts demonstrated animus, I need not rely on them to find animus inferred from other conduct of the Respondent.

Significantly, O'Neill testified, contradicting Jacobs, that he initially took no action against Carper and Richards for refusing to work on March 5. Carper and Richards testified without controversion that when they told O'Neill on March 5 that they would not be in on March 6 if the weather was as severe as forecasted, he said okay. Yet, on March 7, they were terminated for refusing to work on March 5, and not reporting to work on March 6. Further, although O'Neill on March 7 cited an additional reason for terminating Richards—refusing to be reassigned—O'Neill stated nothing about this in his testimony and, indeed, unequivocally testified that the only reason both Carper and Richards were discharged related to the refusal to work on March 5 and the failure to report on March 6. A company's shifting of reasons for discipline, which can encompass expansion, is indicative of discriminatory motive. See, e.g., *Central Cartridge, Inc.*, 236 NLRB 1232, 1260 (1978). I also consider it highly significant that in the last 2 years, the Respondent fired no employees other than Carper and Richards. Finally, the timing of the discharges—1 day after the Respondent had knowledge of their union activity—raises a strong inference of animus.

I therefore conclude that under *Wright Line*, the General Counsel has established a prima facie case that Carper and Richards were discharged for their union activities.

B. Protected Concerted Activity

As to the issue of whether Carper and Richards engaged in a "strike" on March 5, the Board has stated that "a strike exists when a group of employees ceases work in order to secure compliance with a demand for higher wages, shorter hours, or other conditions of employment, the refusal of which by the employer has given rise to a labor dispute." *American Mfg. Concern*, 7 NLRB 753, 759 (1938). Engaging in a work stoppage is not per se sufficient to establish engagement in a strike; the work stoppage must be intended to bring pressure on the employer to change its ways. *New York State Nurses Assn.*,

[25] Remanded 755 F.2d 941 (D.C. Cir. 1988), cert. denied 474 U.S. 948 (1985), and 474 U.S. 971 (1985); on remand (*Meyers II*), 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

334 NLRB 798, 801 (2001); *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978).

Here, Carper and Richards merely informed O'Neill that they were refusing to work because of what they perceived to be unsafe conditions, and he raised no objections to their leaving the jobsite. In these circumstances, I do not find the existence of a demand for anything or a refusal of the employer to accede to any demand. Accordingly, I conclude that Carper and Richards did not engage in a strike when they left the jobsite on March 5.

I now turn to the question of whether their conduct nevertheless constituted concerted activity protected under Section 8(a)(1). Carper and Richards together spoke with O'Neill regarding their refusal to work on March 5 because of safety concerns over jobsite conditions, and they together stated if weather conditions were severe on March 6, they would not be coming to work. They clearly engaged in concerted activity known by the E`mployer.

The next step is determining whether their activity—refusing to work on March 5 because of safety concerns over jobsite conditions and not reporting to work on March 6 because of severe weather conditions—was protected activity. The answer is clearly yes. As the Board stated in *Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002), citing *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962):

> It is well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions, including unsafe or unhealthy working conditions, are engaged in "concerted activities" for "mutual aid or protection" within the meaning Section 7 of the Act.

The conduct is not removed from the protection of the Act unless it is unlawful, violent, in breach of contract, or otherwise indefensible. *Washington Aluminum*, supra at 17; *Odyssey Capital Group*, supra; *Tamara Foods, Inc*., 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983). If the conduct does not come within these categories, the reasonableness of the employees' decision to engage in concerted activities is irrelevant. *Washington Aluminum*, above at 16. Indeed, in *Tamara Foods*, above at 1308, the Board stated that:

> Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected . . . . Whether the protested working condition was actually as objectionable as the employees believed it to be . . . is irrelevant to whether their concerted activity is protected by the Act.

There is no question that Carper's and Richards' conduct was lawful, nonviolent, and breached no contract. The final factor that would remove their conduct from protection is that the conduct was "indefensible." I cannot come to such a conclusion under the facts of this case. While other employees may have disagreed with Carper and Richards that jobsite conditions were unsafe on March 5, no evidence was submitted by the Respondent in the way of expert opinion by qualified safety experts that Carper and Richards made a frivolous or patently nonmeritorious claim of unsafe conditions.

Turning to the events of March 6, Carper and Richards put O'Neill on advance notice on March 5 that threatened severe weather could preclude them from coming to work the following day, and it does not appear that their failure to call him on March 6 was necessary or resulted in any prejudice to the Respondent. In fact, the Respondent made the decision that day that no employees would work because of weather/jobsite conditions. In these circumstances, I cannot conclude that Carper and Richards acted indefensibly on March 6 when they failed to report to work.

I conclude, therefore, that Carper and Richards engaged in protected concerted activity on March 5 and 6 that was known to the Respondent. The Respondent's express bases for the terminations were solely their refusal to work on March 5, and their failure to report to work on March 6. As stated earlier, animus can reasonably be inferred. The General Counsel has therefore satisfied the first prong of analysis under *Wright Line* by establishing a prima facie case of unlawful discharges for protected concerted activity.

C. Whether the Respondent Would have Discharged Carper and Richards Absent their Union and Other Protected Activities

Once again, I deem it of great significance the fact that the Respondent has fired *no* other employees over the past 2 years. Further, O'Neill did not threaten any kind of disciplinary action against Carper and Richards on March 5, either when they told him they would not work or that they would not come in the following day if weather conditions were severe. Yet, 2 days later, they were discharged for these reasons. The Respondent has not alleged that its ability to perform work on the jobsite was in any way negatively impacted by the failure of Carper and Richards to work on either March 5 or 6. Even if O'Neill was not placed on advance notice on March 5 that Carper and Richards might not report on March 6, and it was concluded that they should have called him, the Respondent suffered no prejudice as a result of their failure to appear on that date. On March 6, none of the employees performed any work, and the Respondent actually saved money by not having to pay Carper and Richards for 2 hours' showup time each.

I conclude that the Respondent has failed to meet its burden of persuasion of showing by a preponderance of evidence that Carper and Richards would have been terminated other than for their engaging in union and other protected concerted activities. Accordingly, their discharges violated Section 8(a)(1) and (3) of the Act.

II. THE FAILURE TO HIRE APPLICANTS

Applicants for employment are considered employees within the meaning of Section 2(3) of the Act, and an employer violates Section 8(a)(3) by failing or refusing to hire an applicant for employment because of his or her union membership or activities. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). This protected status extends to union organizer applicants (salts), whether paid or not. See, e.g., *M. J. Mechanical Services,* 324 NLRB 812 (1997), enfd. 172 F.3d 920 (D.C. Cir. 1998); *Braun Electric Co.*, 324 NLRB 1 (1997).

In *FES,* 331 NLRB 9, 12 (2000), the Board held that in cases alleging unlawful failure to hire job applicants, the General Counsel must establish certain elements to meet its burden of proof in demonstrating a prima facie case:

> 1. The Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct.
> 2. The applicants had experience or training relevant to the positions sought to be filled.
> 3. Antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has established such a prima facie case, the burden of persuasion then shifts to the employer under *Wright Line*. Id.; *Zarcon, Inc.*, 340 NLRB 1222 (2003).

Here, elements one and two clearly have been established. Thus, the Respondent advertised for positions in February and, in fact, later that month and the following month hired seven other applicants. All of the alleged discriminatees had relevant experience, and the Respondent has not contended that any of them were unqualified.

Turning to antiunion animus, in failure to hire cases, a showing of specific antiunion animus is not necessary; rather, an unlawful motive will be presumed if the employer's action could naturally and foreseeably have an adverse effect on employee rights, either at that time or in the future. *Radio Officers v. NLRB (A.H. Bull Steamship Co.)*, 347 U.S. 17, 48–52 (1954).

However, there is specific evidence of antiunion animus in this case. In reviewing the applications of the alleged discriminatees, the Respondent admittedly concluded that they were union members based on their prior employment records and did not hire them, although other applicants were hired shortly thereafter. Although the terminations of Carper and Richards—that I have found unlawful under Section 8(a)(1) and (3)—occurred the following month, they were close enough in time to the failures to hire to provide evidence of antiunion animus. Therefore, under the *Wright Line* analysis previously set out, I find that the General Counsel has established a prima facie case of unlawful failure to hire the six applicants.

As to the Respondent's defenses, Parker testified that he saw from the applications that the applicants had made more money on prior jobs than he could afford to pay them and, therefore, did not want to employ them.

Certainly, the Respondent was under no obligation to hire any applicant who would not agree to the wage rate it was prepared to offer. However, the Respondent made the blanket assumption that none of the applicants would accept the amount of pay it was offering and took no steps whatsoever to inquire of any of them whether they would or would not in fact agree to work for that pay rate. I note in this regard that Clappper's and Coe's applications reflected that they had been laid off in January and were currently unemployed. Moreover, all six of the applications left the "salary desired" blank or wrote "open."

The Respondent has not contended there was any change in its employment needs between the time it failed to hire the six (early February), and its hiring of seven employees in late February or early March. Parker testified that he hired those seven other individuals, rather than the six alleged discriminatees, because the former's applications indicated they would accept the $13 an hour he was offering to start. Their applications do not fully bear out his assertion. Thus, Borders stated he was paid $14.50 an hour on his last job, Carper $17 an hour on his last job, McCrary $15 an hour on one of his jobs, and Richards $18–$24 on his last job. Moreover, Gardrim stated that he desired $16 an hour, McCrary $14-plus an hour, and Carper and Richards $18–$24 an hour.

In light of Parker's failure to even inquire of the six individuals what wage rate they would accept and his hiring of other applicants who had either made more than he was prepared to offer and/or who requested more than that amount, seriously undermines the validity of the Respondent's proffered business justification for not hiring the six. In the absence of the Respondent furnishing adequate evidence that it had a bona fide reason for not hiring them, separate and apart from any considerations related to their having worked for unionized companies and receiving union wages, I must conclude that antiunion animus was the motivating factor for their not being hired.

In sum, the Respondent engaged in a hiring standard that operated to automatically disqualify applicants who had received union wages and was therefore inherently destructive of employees' Section 7 right to work in an organized work force. See *Aztec Electric*, 335 NLRB 260, 262–263 (2001), cited in the General Counsel's brief;[26] see also *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961 (6th Cir. 2003). Therefore, the Respondent's failure and refusal to hire the six applicants violated Section 8(a)(3) and (1) of the Act.[27]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to hire Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr., the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
4. By discharging Richard Carper and Anthony Richards Sr., the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. By the above refusals to hire and discharges, the Respondent violated Section 8(a)(1) and (3) of the Act.

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[26] Contrast, *7UP of Cincinnati*, 337 NLRB 521 (2002), in which an employer's refusal to hire an applicant was based on factors unique to him, not a blanket denial of job opportunities to persons who had worked for union wages.

[27] *Exterior Systems,* 338 NLRB 677 (2002), cited in the Respondent's brief, is distinguishable. There, the Board held that a union organizer applicant's misconduct at the jobsite (creating a "disruptive, intimidating, and disrespectful" atmosphere) provided the employer with a valid reason for not hiring him, regardless of his union activity. Here, the Respondent has not alleged any such misconduct by any of the applicants.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily refused to hire applicants, it must offer them employment and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of application to date of proper offer of employment, less any net earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Construction Products, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire job applicants because they previously worked for unionized employers and received union wages.

(b) Discharging employees for their activities on behalf of International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 172, AFL—CIO (the Union), or any other labor organization.

(c) Discharging employees for their protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, and Larry Seymour Jr., employment in the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions.

(b) Within 14 days from the date of this Order, offer Richard Carper and Anthony Richards Sr. full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Richard Carper, Fred Clapper, Gregory Coe, Todd Hoffman, James Jackson, Mary Miller, Anthony Richards Sr., and Larry Seymour Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Richard Carper and Anthony Richards Sr., and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Columbus, Ohio, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 2003.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."